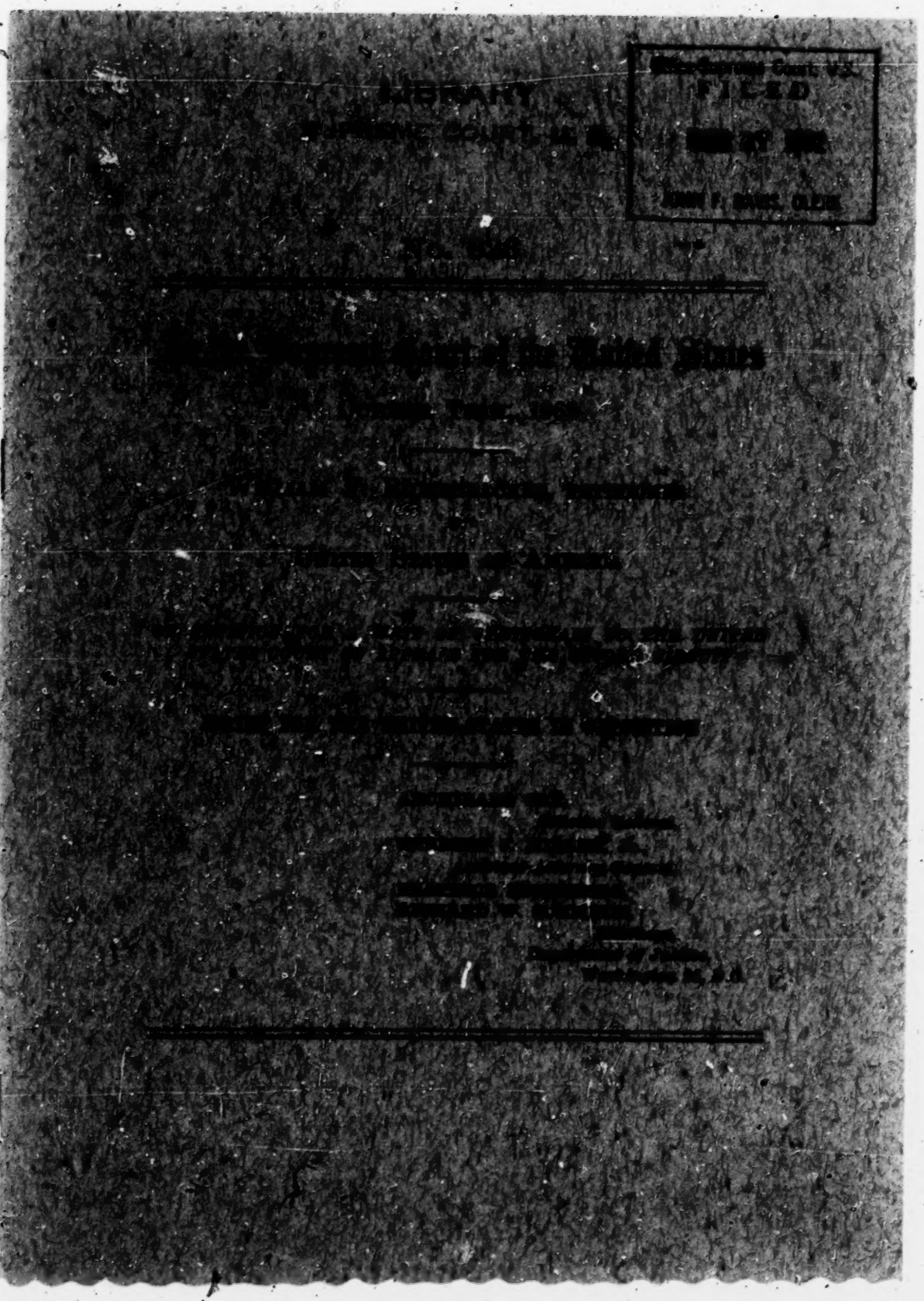

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670530—62——1

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 623

WILLIAM F. RICKENBACKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (R. 81–83; Pet. App. 13–16) is not yet reported. The opinions of the district court (R. 4–6, 73–79) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 29, 1962 (R. 85; Pet. App. 17). The petition for a writ of certiorari was filed on November 28, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioner's conviction for willfully refusing to an-

swer a household questionnaire submitted to him by the Census Bureau as a part of the 1960 decennial census of population, housing and unemployment.

2. Whether the requirement that he answer the household questionnaire violated petitioner's Fourth Amendment rights.

3. Whether the government improperly discriminated against petitioner in prosecuting him.

CONSTITUTION AND STATUTES INVOLVED

Article I, Section 2, Paragraph 3 of the Constitution provides in pertinent part:

> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers * * *. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. * * *

Section 141 of Title 13 U.S.C., 71 Stat. 483, provides in pertinent part:

> (a) The Secretary [of Commerce] shall, in the year 1960 and every ten years thereafter, take a census of population, unemployment, and housing (including utilities and equipment) as of the first day of April, which shall be known as the census date.
>
> * * * * *

Section 195 of Title 13 U.S.C., 71 Stat. 484, provides:

> Except for the determination of population for apportionment purposes, the Secretary may,

where he deems it appropriate, authorize the use of the statistical method known as "sampling" in carrying out the provisions of this title.

Section 221 of Title 13 U.S.C., 68 Stat. 1023, 71 Stat. 484, provides in pertinent part:

> (a) Whoever, being over eighteen years of age, refuses or willfully neglects, when requested by the Secretary * * * to answer, to the best of his knowledge, any of the questions on any schedule submitted to him in connection with any census or survey provided for by subchapters I, II, IV, and V of chapter 5 of this title, applying to himself or to the family to which he belongs or is related, or to the farm or farms of which he or his family is the occupant, shall be fined not more than $100 or imprisoned not more than sixty days, or both.

* * * * *

STATEMENT

Petitioner was charged by indictment returned in the United States District Court for the Southern District of New York with a violation of 13 U.S.C. 221(a), by willfully refusing in May 1960 to answer questions submitted to him on a household questionnaire for the 1960 census of population, unemployment and housing (R. 3). After a trial to the court in March 1962, a jury trial having been waived, petitioner was found guilty. He was sentenced to imprisonment for sixty days the execution of which was suspended, placed on probation for one day,

and fined $100 (R. 2, 79–80).[1] The court of appeals unanimously affirmed (R. 81–84, 85; Pet. App. 13–16, 17).

The pertinent facts may be summarized as follows:

1. In early 1960, the Bureau of the Census of the Department of Commerce distributed to households in the United States two types of forms in connection with the 1960 decennial census of population, unemployment and housing. One form—the "advance census report"—was mailed to every household in the nation, with instructions that it be filled out and turned over to a census enumerator who would call for it (R. 7–8). Petitioner received and completed this form as instructed (R. 29). The remaining form—the "household questionnaire"—was distributed to every fourth household in the nation, with instruction that it was to be completed and mailed to the Census Bureau (R. 8, 51). This questionnaire was distributed to approximately fifteen or sixteen million households, including petitioner's home in Briarcliff Manor, New York (R. 28, 29, 34, 45, 46). The cover page of the questionnaire noted in two places that federal law guaranteed that the information furnished would be kept confidential (R. 51a).

The household questionnaire consisted of two sections—a household section (questions H 17–H 46) and

[1] Petitioner was sentenced on May 17, 1962, and noted his appeal on the same day. Shortly thereafter, he paid the $100 fine, which left outstanding his sentence of one day's probation. Inasmuch as noting the appeal stayed the probation before it could possibly have been served (see Rule 38 (a) (4), F.R. Crim. P.), the case is not moot.

an "extra person" section (questions P 2–P 35), a total of 63 questions in all. The household section was prefaced with the notation that "Most of these questions refer to your own house or apartment *but note* that questions H 20, H 32, and H 33 are about the *whole building* in which you live," and posed questions relating to the household itself, *e.g.*, number of bedrooms and bathrooms, types of utilities, number and types of appliances, etc. (R. 51b–51c). The "extra person" section was prefaced with the notation that "After you finish the housing questions—Fill in the following pages for persons whose names have been written in by the Census taker," and posed questions relating to the "extra persons" in the household, *e.g.*, their names, birthplaces, occupations, employment, income, relationship to head of household, etc. (R. 51d–51e).

The Federal Housing Administration assisted the Census Bureau in framing the questions on the household questionnaire (R. 45, 47). Data from the questionnaires would, in normal course, be summarized and used by various governmental agencies and departments for guidance in such matters as aid to housing (R. 44, 45, 47–48).

2. In May 1960, Mrs. Margaret Riolo, an employee of the Census Bureau, left a household questionnaire at petitioner's home (R. 11). The form had not been completed when she subsequently returned for it, and she left a second household questionnaire. Mrs. Riolo subsequently telephoned petitioner's house "to see if the form had been completed and sent in" and was informed that petitioner was out of town (R. 11). A

short time later, Mrs. Riolo reached the petitioner by telephone at his home. Mrs. Riolo testified (R. 12):

> I asked him if he had sent in either of the forms that had been left with him. He said no, he hadn't and he didn't intend to. I told him I'd have to report this to my crew leader, and he said to go right ahead, that he wasn't going to fill out the form.

Petitioner wrote an article which appeared in the *National Review Magazine* of May 21, 1960, in which he challenged the propriety and legality of the household questionnaire and stated that he did not intend to answer the questionnaire, and that he had torn up the questionnaire which had been left with him (R. 64–71). Petitioner introduced the magazine article into evidence at the trial (R. 27–28, 64–71).

3. On December 19, 1960, petitioner appeared before a federal grand jury in New York. After being advised of his constitutional rights, he said that he told the census enumerator that he did not intend to fill out the household questionnaire (R. 52–53). The basis for this refusal was not possible self-incrimination or degradation; rather, he believed that the questionnaire violated his Fourth Amendment rights and his right to privacy. He said (R. 54–55):

> * * * I recognize that the Government has a need to collect statistics for legislative and regulatory purposes, but I recognize at the same time that many statistics are gathered by corporations and opinion polls, such as the Gallup Poll, without recourse to the coercive and compulsive force. They are volun-

> tary surveys and they serve their purpose. * * * I have no objection to the questions asked, per se. I have desired to maintain liberties in this country as a constitutional philosophical question.

Petitioner thereafter answered before the grand jury the questions contained in the household questionnaire (R. 30, 55–61). The grand jury testimony was introduced into evidence at the trial (R. 14–15, 52–61).

4. At the trial, petitioner testified that he did not fill out the household questionnaire; that he explained his action to the census enumerator; and that he was aware that his conduct conflicted with the statutes (R. 28–29, 30; see R. 53–54). He said that the magazine article which he wrote expressed his opinion as to the propriety of the questionnaire (R. 27).

In addition to testifying himself, petitioner called as witnesses Mr. Robert Burgess, the Director of the Census Bureau during the period in question, and Mr. Reuben Cohen, an expert in the field of private surveys. Mr. Burgess testified that although no information had been submitted to him while Bureau Director regarding the number or percentage of refusals to fill out census forms, the number of "complete refusals" was "very small" (R. 34–37). The Census Bureau had a policy of recommending prosecution in those cases involving individuals who "persisted in refusal" to answer census questions (R. 43).[2] Mr. Burgess first

[2] Mr. Burgess testified as a witness in *United States* v. *Sharrow*, 309 F. 2d 77 (C.A. 2), pending on petition for certiorari, No. 755 Misc., this Term, another prosecution under 13 U.S.C. 221 (R. 47).

learned of petitioner's refusal through his magazine article.

Mr. Cohen, the vice-president and chief statistician of the Opinion Research Corporation of Princeton, New Jersey, testified that in making nationwide surveys his company used sampling bases of from about 500 to 5,000 interviews (R. 17, 18, 25). He said that his company had no means of coercion or forcing the interviewees to answer questions, and that refusals to answer questions ranged from five to ten percent (R. 22). He and Mr. Burgess both testified that the Census Bureau, in conjunction with the Bureau of Labor Statistics of the Labor Department, conducted monthly surveys of population and employment based on about 35,000 interviews per survey without coercion (R. 24, 36–37, 62, 63).

ARGUMENT

1. (a) Petitioner contends (Pet. 12) that the evidence was insufficient to support the conviction because the government did not show that the census enumerator propounded any questions to him orally or that he refused "to answer orally when invited to do so." The short answer, however, is that 13 U.S.C. 221(a), *supra*, is not limited to refusals to answer appropriate questions which are in response to questions orally propounded. The statute makes it an offense for anyone over eighteen years of age to refuse or willfully neglect "to answer * * * *any* of the questions on *any schedule submitted to him* in connection with any census or survey * * * [concerning popula-

tion, housing, agriculture, drainage and unemployment], applying to himself or to the family to which he belongs or is related * * *" (emphasis added). The household questionnaire was a schedule authorized by and prepared under 13 U.S.C. 5, and was submitted to the petitioner for completion within the meaning of Section 221(a). The questionnaire did not provide or contemplate that any questions would be asked orally; it required the recipient to answer the questions in writing, and then to return the questionnaire to the Census Bureau.

(b) Petitioner's contention (Pet. 10–11) that Section 221(a) is inapplicable because the household questionnaire did not distinguish between "proper questions" relating to "self" and "family" and allegedly "unauthorized" questions relating to the household is frivolous. For the statute draws no such distinction; Section 141 specifically authorizes questions relating to "housing (including utilities and equipment)." In any event, as shown in the Statement, *supra*, the questions pertaining to household were adequately differentiated from those relating to the persons within that household. The household questions were numbered beginning with the letter "H" and were prefaced by a statement that the questions following it related to the household. The questions relating to the persons within the household were numbered beginning with the letter "P" and were prefaced by a similar statement. And, as the court of appeals pointed out in rejecting another contention, not here made, based on the distinction between questions relating to family and to household, "many of the questions on the house-

hold questionnaire which appellant refused to answer were immediately related to himself or to his family * * *" (Pet. App. 15).

2. There is no substance to petitioner's claim (Pet. 5–6) that the household questionnaire violated his rights under the Fourth Amendment. There was no unauthorized intrusion into petitioner's house; no search of the petitioner or of his premises; no seizure of the petitioner or of any of his private papers and effects. The demand that petitioner answer a limited number of questions based on his own personal knowledge of his household in order to provide statistical data which would be held confidential cannot be equated to a "dragnet" subpoena for the production of books and records over a long period of time to be used in uncovering violations of law.

While Article I, Section 2, Paragraph 3 of the Constitution, *supra*, merely imposes upon Congress the duty of taking an enumeration of the population every ten years "in such Manner as they shall by Law direct," there is no question but that Congress, in addition to taking a physical census of the population, may provide at the same time for the collection of information and statistical data reasonably related to governmental functions and purposes. See *Legal Tender Cases*, 12 Wall. 457, 536; *United States* v. *Moriarity*, 106 Fed. 886, 891–892 (S.D.N.Y.). Cf. *United States* v. *Sharrow*, 309 F. 2d 77 (C.A. 2), pending on petition for certiorari, No. 755 Misc., this Term. Cf. *St. Regis Paper Co.* v. *United States*, 368 U.S. 208, 215–220; *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186.

As to the housing census, the Senate Report on the National Housing Act of 1949, 63 Stat. 413 (S. Rep. No. 84, 81st Cong., 1st Sess., p. 27) clearly explained the need for such information.

> In its study of the housing situation your committee has been deeply impressed by the urgent need for a comprehensive picture of the size and quality of the Nation's housing inventory. Time and again in the course of the testimony on this bill the importance of knowing in detail the facts about the housing supply which provides shelter for some 40,000,000 American families became apparent. While the sample census taken in April 1947 has shed considerable light on the over-all magnitude of our present problem and has emphasized the deficiency in our housing inventory in terms of its adequacy for meeting the needs of a substantial segment of our population, there are many gaps in our knowledge which can only be filled by a complete census of housing which will provide an accurate measure of the changes in the size, characteristics, and quality of the housing supply, community by community, and furnish a basis for a careful reappraisal of the problem in the light of conditions then prevailing.

Petitioner also complains that the information sought by the government on the household questionnaire could have been obtained without coercion and without a sampling of 16,000,000 householders (Pet. 6–7). He relies upon the testimony of an expert in the field of private surveys and the testimony of Mr. Burgess and exhibits showing that the government makes certain monthly surveys without coercion and

upon a sampling base of 35,000 interviews. However, petitioner's own expert testified that, generally speaking, a larger sampling base would yield more accurate results (R. 26). The government had the right to make its data as exact as it deemed appropriate. Mr. Burgess testified (R. 46):

> The difficulty is there that we were going through the census purposely. We were going to go into enough details, so if I remember, Professor Millstein of Princeton was very reluctant to endorse our going ahead with the one and four sampling for those particular things, for our purposes. *They needed to be able to differentiate within a city, down to blocks, enumeration of districts* [emphasis added].

In any event, as the district court said (R. 78):

> The fact, even if true, that 5,000 interviews or questionnaires would suffice does not excuse defendant. In no event would he be entitled to the special privilege of elimination. He is in no position, on the other hand, to complain upon behalf of the 15,000,000.

3. Finally, petitioner contends (Pet. 7–10) that his prosecution was initiated in retaliation for his writing of the magazine article and that his conviction therefore resulted from discriminatory enforcement of the statute and is invalid under *Yick Wo* v. *Hopkins*, 118 U.S. 356. He emphasizes that his refusal to answer the questions was first brought to Mr. Burgess' attention through the magazine article, and that a letter from the Department of Commerce to the United States Attorney referring the

matter for "further proceedings" enclosed a copy of the magazine article and closed by stating that petitioner should "not * * * be permitted to disregard the law in this manner" (R. 71–72). The short answer, however, is that the petitioner was prosecuted for his adamant and willful refusal to answer the questionnaire, not for his writing the magazine article. The magazine article, to be sure, confirmed that petitioner's refusal was willful. Indeed, petitioner testified at the trial that the magazine article expressed his opinion of the household questionnaire, and he introduced the magazine article into evidence as a defense exhibit (R. 27–28, 64–71). There is nothing in the record to indicate that petitioner's prosecution was discriminatory. He was indicted by an unbiased grand jury which heard petitioner admit before it that he had told the census enumerator that he did not intend to fill out the questionnaire. In such circumstances, the grand jury had little choice but to return an indictment.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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DECEMBER 1962.

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